No. 10036.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER, *et al.,*

Appellees.

APPELLANT'S CLOSING BRIEF.

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The entire argument of the appellees' reply brief centers upon one main issue and that is the contention that the trustee and objecting creditors had established a *prima facie* case for the denial of the discharge, and that the bankrupt had then not met his burden of proof. Therefore, in this closing brief, the attention of this Honorable Court will be respectfully directed to only one major remaining issue and that is, does the transcript of record in the within proceedings indicate that the Referee had before him any facts which would justify a finding by him that the mortgage involved in the objection to the discharge was delivered by the bankrupt within the 12 months' period prior to bankruptcy?

Argument.

Upon the hearing on the objection to the discharge of the appellant the objectors introduced evidence solely to the proof that the mortgage involved was delivered on the 15th day of March, 1939, more than 12 months prior to the bankruptcy and therefore it was accepted by the bankrupt and it was not incumbent upon him to verify this date since it had been established by the objectors and had not been disproved in any other manner.

I.

At pages 4, 5, 6, 7, 8 and 9 of the Appellees' Reply Brief, continuous reference is made to the fact that no testimony was allegedly offered by the bankrupt as to when delivery was made of the documents in question and that therefore the Referee and the Court were justified in finding that the delivery was made on the date the instruments were recorded, that is to say, on July 25, 1939, within one year of the bankruptcy.

However, this argument, which appears to be the sole answer which the appellees have to the contentions presented by the appellant in the opening brief, fails to consider one obvious and undisputed factual situation. In presenting the evidence in support of their objections, the objectors incorporated the complaint, findings of fact, conclusions of law and judgment in a Superior Court action entitled *Balding versus Averill, Jr., et al.,* No. 448466. As has been pointed out in the opening brief and the reply brief, it is solely upon this judgment that the objectors' predicated their case before the Referee and

the District Court. It is their contention that these findings of fact are *res adjudicata* as to the facts involved in the Superior Court action and that therefore the bankrupt would not be entitled to show that the transfers were not fraudulent. With this contention, we have no quarrel. However, in relying upon the findings of fact, conclusions of law and judgment, to sustain their own case, the appellees must also accept the findings where the same would be favorable to the bankrupt.

(a) In Finding No. IV [Tr. p. 50] and Finding No. VII [Tr. p. 52], the trial court expressly finds that on or about the 15th day of March, 1939, the bankrupt herein did make, *deliver* and execute to the mortgagee, the mortgages involved in the State Court proceedings.

(b) In view of the absence of any testimony submitted by the objectors at the time of the hearing on the objection to the discharge and their reliance solely upon the documents in the Superior Court, it is obvious that the appellees themselves have sustained any burden of proof which might otherwise be placed upon the bankrupt. What better evidence could there be of the facts than the findings of fact upon which the appellees predicate their entire case of fraud? They cannot have their cake and eat it too, in the sense of being entitled to use the Superior Court proceedings as *res adjudicata* on the issue of fraud and at the same time refuse to recognize that this same Superior Court said that the mortgages in question were made, delivered and executed on March 15, 1939, more than 12 months prior to the commencement of the bank-

ruptcy proceedings. Until the appellees introduced the evidence to refute the factual situation which they themselves had established, the bankrupt would not only be foolish to attempt to again bring up the issue of the date of delivery, but he could not, by his testimony before the Referee, vary the findings of fact and judgment in the Superior Court which were then and are now tendered by appellees as *res adjudicata* of the factual issues involved.

Conclusion.

In the court below, the appellees had the burden of proving that the appellant had committed an act forbidden by the Bankruptcy Act within 12 months prior to his adjudication in bankruptcy. It is the contention of the appellant that there are no facts in the record which could sustain such a finding by the Referee or the District Court. The only evidence introduced definitely establishes that any acts of the appellant which might have been criticized were committed by him more than -12 months prior to the commencement of the bankruptcy proceedings.

Respectfully submitted,

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